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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 743

DANIEL P. WOOLEY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 20–25) is reported at 39 B. T. A. 802. The opinion of the United States Circuit Court of Appeals (R. 77–80) is reported at 122 F. (2d) 167.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 15, 1941 (R. 81). The petition for a writ of certiorari was filed November 14, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the income of a short-term trust for the benefit of the settlor, his wife, and nephew was taxable to the settlor under Section 22 (a) of the Revenue Act of 1934, he having retained the reversion and certain powers of control and having appointed his wife the sole trustee.

2. Whether in the circumstances the Commissioner waived reliance upon Section 22 (a) by not invoking it before the Board.

3. Whether, if the Circuit Court of Appeals erred in holding the settlor taxable under Section 22 (a), he was not, in any event, properly taxed under Section 167 (a) (2).[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statute involved are set out in the Appendix, *infra*, pp. 10–11.

STATEMENT

The facts, as found by the Board (R. 15–20) and shown by the evidence, may be stated as follows:

On February 10, 1933, petitioner transferred certain property in trust to his wife, as trustee.

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[1] The applicability of Section 167 (a) (2) was not passed upon by the court below and is not considered in the petition. Hence we do not discuss it herein. Should the petition be granted, however, we will urge it as an alternative ground supporting the decision upholding the tax.

Under the trust (R. 52–58), which was to terminate upon petitioner's death, she was to take control of the property, invest and reinvest it, and receive the income. She was to distribute all or part of the net income to petitioner, to an infant nephew of petitioner, or to herself, in such amounts in accordance with their needs as she, in her discretion, might determine, and to accumulate the balance, if any, for the benefit of the nephew, to be paid to him upon his attaining the age of 21, or, if he should die before, to his heirs. Upon termination of the trust, the principal and any additions thereto were to be paid over to petitioner's estate. (R. 15–16, 52–54.)

The trust provided that petitioner could revoke it in whole or in part after December 31, 1933. It also provided that upon written notice from him directing the sale or lease of any of the trust property, the trustee should sell or lease the same, and that, upon similar notice, the trustee should make any purchases or investments which petitioner might direct, provided, however, that such sales or purchases be at a price equal to the fair market value. In addition, petitioner reserved the right at any time to substitute for the property constituting the principal of the trust "any other investments, securities, or property that he may wish," if of equal market value at the time, and the right to appoint a successor trustee in the event that his wife should die or resign prior to the termination of the trust (R. 16–18, 54–55).

On June 19, 1934, petitioner wrote a letter to his wife as trustee, notifying her that he was revoking the trust, "said revocation to effect a termination of said instrument and of said trust as of January 1, 1937" (R. 18, 61–62). She acknowledged receipt of the letter and of the fact that the trust would terminate on the date specified (R. 18, 62). Also on June 19, 1934, petitioner entered into an agreement with his wife whereby, in consideration of the payment of $100 by her, he agreed to relinquish any right which he might have to revoke the trust on or before January 1, 1937 (R. 18–20, 59–61). The following day, by letter to her, he relinquished any possibly remaining right he might have "by further revocation or in any other manner" to cause the trust to terminate earlier than January 1, 1937 (R. 20, 63–64).

In his return for 1934 petitioner reported the income which accrued from January 1 to June 19, 1934, the date when he surrendered the power to revoke, and there was no dispute as to his taxability for that period. The income from June 19 to December 31, 1934, amounting to $11,926.71, which alone is in controversy, was reported by the trust, having been accumulated by the trustee and not been paid or credited to any beneficiary during the year (R. 20, 42–43).

The Commissioner transferred the latter amount of income to petitioner and assessed a deficiency (R. 10, 42–43, 67, 71–73). Thereafter, on April

29, 1939, which was prior to the decision of this Court in *Helvering* v. *Clifford,* 309 U. S. 331, the Board of Tax Appeals held that the income in question was not taxable to petitioner under Sections 166 or 167 of the Act, or under the theory of substantial ownership, as contended by the Commissioner (R. 20–25).

On review in the court below, subsequent to this Court's decisions in the *Clifford* case and in *Helvering* v. *Wood,* 309 U. S. 344, the Commissioner abandoned his reliance upon Section 166 and contended that the income was taxable to petitioner under Section 22 (a) and, in any event, under Section 167 (a) (2). The court sustained the Commissioner's contention based upon Section 22 (a) and reversed the order of the Board with directions to reinstate the deficiency determined by the Commissioner. The court did not pass upon the argument based on Section 167 (a) (2) (R. 77–81).

ARGUMENT

In view of the shortness of the term of the trust as revised, of the intimate family beneficiaries,[2] including petitioner, of petitioner's reversion, of his express powers of control, and of the added fact that the trustee was his wife who, it would be expected, in managing the principal and distributing the income, normally would be responsive

[2] Petitioner testified that after the execution of the trust he and his wife adopted his nephew and that the latter was living in their household (R. 45).

to his wishes, if not wholly guided by them, there can be no doubt of the applicability of Section 22 (a) within the rule of the *Clifford* case. Our brief in opposition to the pending petition for certiorari in *Barbour* v. *Helvering,* No. 727, this Term, shows that a settlor may be taxed under Section 22 (a) though he reserves no express powers of control and is not a beneficiary and though the trust be for a term longer than that here involved.

1. Petitioner does not contend that there are any controlling differences between the instant trust and that in the *Clifford* case. But he argues (Pet. 5–7) that the question whether he was the owner of the corpus so as to be subject to Section 22 (a) was determined in his favor by the Board and that such determination was one of fact and hence was conclusive on the court below since supported by substantial evidence.

Although the Board did not mention Section 22 (a) or make any express finding that petitioner was not the owner of the corpus, it did overrule the Commissioner's contention to the effect that petitioner was the substantial owner and for that reason taxable (R. 24–25). That determination, however, was not conclusive on the court below. The question of ownership for purposes of Section 22 (a) is at least a mixed question of fact and law, and while the reviewing court must accept the evidentiary and circumstantial facts as found by the Board, provided the findings are supported by sub-

stantial evidence, it may reach its own conclusion on the legal issue whether, upon those facts, not here disputed, the settlor is to be regarded as the taxable owner. See *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481; *Hormel* v. *Helvering*, 312 U. S. 552; *Helvering* v. *Richter*, 312 U. S. 561; *Bogardus* v. *Commissioner*, 302 U. S. 34. No conflict is alleged on this point.[3]

Even if the Board's determination were to be treated as a finding of fact, the court below could not be held to have erred. For in view of the decisions in the *Clifford*, *Hormel*, and *Richter* cases, the evidence relied on by petitioner (Pet. 7) as tending to show that he had divested himself of ownership is immaterial. Cf. *United States* v. *Pyne*, 313 U. S. 217.

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[3] This Court's statement in the *Clifford* case (309 U. S. at 336), "we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22 (a)", cannot properly be construed to mean that the question is one of fact in the sense that the Board's ultimate finding, if supported by substantial evidence, is conclusive. Neither in *Commissioner* v. *Branch*, 114 F. (2d) 985 (C. C. A. 1st), nor in *White* v. *Higgins*, 116 F. (2d) 312 (C. C. A. 1st) did the court so apply the statement; in the latter case the taxes were upheld under Section 22 (a) despite the absence of Board findings on the issue. In *Commissioner* v. *Central Nat. Bank*, 119 F. (2d) 470 (C. C. A. 6th), the court simply remanded the proceeding for rehearing to permit the introduction of evidence on the question, pursuant to this Court's dispositions in the *Hormel* and *Richter* cases, *supra*. It did not hold or intimate that the Board's determination would be conclusive.

2. Petitioner also contends (Pet. 5, 8) that the Commissioner waived reliance upon Section 22 (a) at the hearing before the Board and that, therefore, under the decision in *Helvering* v. *Wood,* 309 U. S. 344 (inadvertently cited 637), the court below erred in applying the Section. In the *Wood* case (pp. 348–349) this Court refused to consider whether the tax there involved was valid under Section 22 (a) since in his brief before the circuit court of appeals the Commissioner had expressly waived reliance upon any section other than Section 166. Here, however, there was no such waiver. The applicability of Section 22 (a) was fully urged to the court below in the brief for the Commissioner, and, although it had not been specifically relied on before the Board, it had not been renounced.[4] Thus the court was correct in considering it. *Hormel* v. *Helvering, supra; Helvering* v. *Richter, supra.* This would seem especially true where as here the taxpayer does not contend that he had no opportunity to meet the issue before the Board or that the Board did not make findings on the question, but urges (Pet. 5–7), on the contrary, that the Board's findings were in his favor and were conclusive.

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[4] The statements (R. 47–49) of the Commissioner's counsel before the Board, referred to by petitioner (Pet. 7), to the effect that Sections 166 and 167 were relied on in support of the tax, did not constitute a waiver of reliance upon Section 22 (a). The latter was not mentioned.

CONCLUSION

The decision below correctly follows the controlling decisions of this Court. There is no conflict of decisions, and no question calling for any further review by this Court. The petition should therefore be denied.

Respectfully submitted.

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DECEMBER 1941.